In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-525

JOE D. ROGERS AND GERTRUDE K. ROGERS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners own a tract of land totally surrounded by a national forest. For years access to the land had been by way of a dirt road usable by 4-wheel drive vehicles but not usable by ordinary passenger cars. Petitioners applied to the Forest Service for a permit to bulldoze a road 12 feet in width roughly parallel to the existing road.[1] Without receiving the permit, they constructed the road (Pet. App. I, pp. 2-3).

In defense of a suit brought by the United States to prevent their use of the road and to require restoration of the land to its prior condition, petitioners

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[1]Such a permit is required by 36 C.F.R. 251.1(a)(1); see Pet. App. I, p. 2

alleged that they have a constitutional right to build the road and that they had received permission from a Forest Ranger to do so (Pet. 13-14). Their receipt of permission from the Ranger to improve the old road was not disputed (although the Ranger's authority to give even this permission is denied by the government). But petitioners did not merely improve the existing road; they built a parallel road and the Ranger denied that he approved the construction of the parallel road (Pet. 15).

The district court and the court of appeals held that petitioners did not have a right to build the parallel road across federal land without obtaining a permit. Petitioners had failed to obtain the requisite permit and had failed to show facts sufficient to estop the government from requiring such a permit. But the court of appeals stayed "that portion of the [district court] judgment requiring appellants to restore the land to its prior condition * * *" because of the pendancy of administrative proceedings for a special permit approving the parallel road (Pet. App. I, p. 4).[2]

The decision of the court of appeals is correct, it does not conflict with any decision of this Court or any other court, and presents no question warranting further review.

Petitioners could not bulldoze over federal land without obtaining the required permit. Their arguments to justify what they have done should be addressed to the Forest Service which issues permits.

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[2]The Department of Agriculture action on petitioners' application for a permit has been delayed pending termination of this litigation (Pet. App. I, p. 3).

As to the alleged estoppel, we rely on the opinion of the court below that in light of the disputed testimony and the lack of affirmative evidence of misconduct by the government, no ground for estoppel has been shown (Pet. App. I, pp. 3-4). Moreover, as this Court said:

> Power to release or otherwise dispose of the rights and property of the United States is lodged in the Congress by the Constitution. Art. IV, §3, Cl. 2. Subordinate officers of the United States are without that power, save only as it has been conferred upon them by Act of Congress or is to be implied from other powers so granted.

Royal Indemnity Co. v. *United States,* 313 U.S. 289, 294.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.